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May 27, 1994

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

~~VIA~~ FEDERAL EXPRESS

MAY 31 19..

Re: Emergency Petition for Extension of Refund Liability Deferral Period for Certain Small Operators

MAIL ROOM

Dear Mr. Caton:

Enclosed are the original and 14 copies of the above-captioned Petition for filing. We have also enclosed a copy with a self-addressed stamped envelope and request that a file-stamped copy be returned to us.

The prompt dissemination of this information to the Commissioners and appropriate staff members is greatly appreciated.

If you have any questions or comments, please call us.

Very truly yours,

HOWARD & HOWARD

Eric E. Breisach

Eric E. Breisach

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Enclosures
cc: Mr. David D. Kinley
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	))))))))	MM Docket No. 92-266

EMERGENCY PETITION FOR
LIMITED EXTENSION OF REFUND LIABILITY DEFERRAL PERIOD
FOR SMALL SYSTEMS AND SMALL OPERATORS

SUBMITTED BY
THE SMALL CABLE BUSINESS ASSOCIATION

Eric E. Breisach

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Attorneys for the Small Cable Business Association

Dated: May 27, 1994

INTRODUCTION

The burdens of implementing rate regulation has fallen most harshly on the operators of small cable businesses and systems with fewer than 1,000 subscribers that are owned by small multiple system operators (MSOs). Most of these operators have never dealt with rate regulation before.

Despite its efforts to resolve a number of key issues with the Commission staff, the Small Cable Business Association (SCBA) has not been able to reach closure on them. Given that: (1) many smaller systems and operators have not received clear direction regarding implementation issues despite numerous requests for clarification; (2) the Commission has adopted more favorable implementation policies for larger cable operators; and (3) the rate restructuring for many of the operators would be revenue neutral by design, SCBA respectfully requests that the Commission extend the refund liability deferral period for those small cable systems and operators who are entitled to transitional relief under the Commission's rules.

UNRESOLVED ISSUES

SCBA has been communicating both verbally and in writing with various members of the Cable Services Bureau staff over the past two months about implementation issues that significantly impact or are unique to small operators and small cable systems owned by small MSOs as defined by the Commission. Despite continuing communication, several pivotal issues remain unresolved. Furthermore, only last Monday, May 23, 1994, SCBA learned that the Commission was privately recanting the official position adopted in an answer to a question published on May 6, 1994. This change in position effectively advances the implementation date for small systems by one month -- from August 1 to July 1 meaning that 30 day advance notification must be given on June 1, only 4 days from today.

A summary of the issues raised by SCBA follows:

Equipment Unbundling

Much confusion has arisen about the right of a cable operator to unbundle and restructure its rates in a revenue neutral manner on or after the date of initial regulation. The current regulations are unclear as to whether operators might not have this right[1]. It is the same regulations that prohibited an operator with below benchmark rates from increasing its rates to the benchmark level. SCBA has previously been advised by senior Commission staff that operators do not have this right.

SCBA has also been advised by other staffers that operators have this right under the revised regulations and forms. Nevertheless, we understand this to be an issue that remains unresolved among the Bureau staff. Given this magnitude of uncertainty, SCBA and its members need definitive guidance from the Commission as to its policy in this area. SCBA first raised this issue in writing in a letter dated April 18, 1994 and has resubmitted it several times since then, most recently on May 24.

Many systems with fewer than 1,000 subscribers have not previously unbundled rates due to the stay of rate regulation for small systems. These systems, many of which have

[1]47 C.F.R. Section 76.922 et. seq., establishes the framework for computing service rates which have been reduced for the amount that should be charged for equipment, even if that charge had not yet been established. It does not clearly grant the right to establish the equipment charge, or to increase the basic rate for a reduction in an equipment charge that is no longer permitted (i.e., additional outlet fees).

franchising authorities that certified during the stay period, must decide whether or not to unbundle and redistribute equipment and tier rates.

The issue is of key importance as operators who are charging a permitted amount in total might not be charging the appropriate rates on a component by component basis[2]. Therefore, operators might lose revenue simply by not having properly distributed rates. To avoid this, smaller operators will likely preemptively unbundle. When this happens, most will eliminate additional outlet charges, a move that will redistribute the rates to basic service, causing basic rates to increase. Although only 3.57 percent[3] of subscribers nationally would be affected by this change, given the tremendous number of small systems, over half[4] of systems nationally would be affected by this change. The staff of the Cable Services Bureau is struggling to deal with an avalanche of questions about the new rate rules. The recent meetings with Commission staff in New Orleans at the NCTA convention have increased dramatically the number of important issues being raised. Therefore, SCBA does not believe that clarification on the unbundling issue can be achieve before June 1. In particular, we believe that the Bureau staff simply needs more time to eliminate the confusion in a rational manner.

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[2]i.e., an operator might be charging too much for additional outlets and not enough for basic service. The result would be that a franchising authority would lower the rate for additional outlets while prohibiting recovery of the reduced charge through an increase in basic rates.

[3]Warren Publishing, Television and Cable Factbook, Vol. 62, 1994.

[4]Warren Publishing, Television and Cable Factbook, Vol 62 lists 6,157 systems with fewer than 1,000 subscribers. Out of a total of 11,160 systems, 55 percent have fewer than 1,000 subscribers.

If additional time is not given, small operators will have no choice but to begin unbundling these rates.

Pursuant to the Commission's recent pronouncement in a *Question and Answer*, not only might small operators be at risk for future revenue loss by not preemptively unbundling, but they may also be subject to refund liability. As SCBA understands the Commission's position in this matter, if an operator unbundles rates effective August 1, 1994[5], it will lose the benefit of the deferral period. Although small operators thought they were protected from refund liability arising merely from a failure to unbundle[6] this no longer appears to be the case[7]. Clear direction is essential in this matter.

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[5]As discussed later in this *Petition*, most small operators have relied on the plain language of a Commission pronouncement that gave them until August 1, 1994 to complete restructuring as opposed to July 14, 1994.

[6]The Commission's *Third Order On Reconsideration* at Paragraph 104 states that:

> To not allow cable operators to factor in equipment charges could result in an operator being required to make a rate reduction that is greater than the maximum reduction required under application of the benchmark approach. This analysis is consistent with our earlier statement that "the cable operator must make prospective billing adjustments to refund overcharges (<u>and offset any undercharges</u>) in a reasonable manner."

[7]In its *Question and Answers* released May 6, 1994, the Commission imposed refund liability on small operators who did not voluntarily unbundle rates:

> Q14. Do operators have to unbundle equipment if they are not rate regulated?
>
> A14. No. A cable operator whose rates are unregulated is not required to unbundle its equipment and installation charges from its programming charges. If, however, such an operator does not unbundle (or otherwise restructure its rates to comply with the FCC's rate rules) and later becomes subject to regulation, it may face refund liability.

Implementation Date

In the *Questions and Answers* released May 6, 1994, the Commission, in plain language gave operators who bill on a monthly basis the ability to avoid mid-month restructuring. Such operators had until August 1, 1994 to reflect the new rate on subscriber bills. Specifically, the Commission stated:

Q6. If a cable operator restructures its rates on July 14, 1994 and July 14 falls in the middle of a period billed for, must the cable operator adjust the bill to charge different rates for the period before and after July 14?

A6. No. In those circumstances, each bill may charge a single rate, so long as the period billed for does not exceed one month. A cable operator restructuring on July 14, may charge the pre-restructuring rates on bills sent out before July 14, but it must charge the restructured rate on all bills sent from that date.

These words are unambiguous. Most operators of smaller cable businesses bill on a monthly basis for each calendar month[8]. For these monthly billing systems, "July 14 falls in the middle of a period billed for...." Therefore, monthly billing operators according to this pronouncement have until August 1, 1994 to bill the new rates.

SCBA learned that the Commission apparently intended to provide this preferential treatment to operators that have more than one billing cycle per month (i.e., larger operators). Even if the Commission were to prevail on this position, it is inequitable for two reasons:

1. Disparity in Implementation Deadlines - Larger operators, even though part of their billing is performed on a monthly basis (i.e., first cycle) need not modify their first

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[8]Most small operators do not have the ability to prorate bills (i.e., charge one rate for the first 14 days and another for the last 17). Therefore, they would be forced to bill a single blended rate for July which would cause immense subscriber confusion when they are charged different rates for June, July and August.

cycle bills. This means that the first implementation date is July 14 as opposed to July 1 for smaller operators[9].

2. Revenue Gain - A cycle billing operator will typically bill one-half of its subscribers in one or more cycles during the first half of the month and the other half during the remainder of the month. Consequently, half of the subscribers will pay the present rate for the entire month of July -- effectively, the operator has gained one week of additional revenue[10]. On the other hand, small operators who are forced to roll back rates actually lose 3 weeks of revenue[11].

Not only does the Commission seek to contradict the plain language of its pronouncement, but it has apparently known for some time about the interpretation of the Answer by smaller cable operators. Nevertheless, the Commission has not issued any clarification. Smaller cable operators have the right to rely on the express pronouncements of the Commission, especially where it knew about a widespread interpretation and did nothing to correct the record.

The Commission has granted a significant concession to ease implementation of the new rules for larger cycle-billing cable operators. It is only fair that the same type of treatment be accorded smaller cable operators and certain small systems.

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[9]The Commission cannot lose sight of the extraordinary time pressure on such smaller operators who must provide 30 days advance notice to subscribers about rate changes, making the effective date of the rules June 1.

[10]i.e., if the cable operator receives the present rate from one half of its subscribers for a two week period, that equates to one week of full revenue.

[11]Operators of small systems with fewer than 1,000 subscribers that are owned by small MSOs are not accorded the same one week that large cycle-billing operators are given and they must implement the rates on July 1, not July 14.

PROPOSED EXTENSION

SCBA proposes that the Commission extend the refund liability deferral period from July 14, 1994 to October 1, 1994 for operators with fewer than 15,000 subscribers and for systems with fewer than 1,000 subscribers that are owned by small MSOs as defined in the Commission's regulations at 47 C.F.R. Section 76.922(b)(5)[12].

As articulated above, the extension is necessary to allow the Commission time to resolve the pivotal implementation issues to allow a smooth implementation for both small operators and their subscribers. Nothing could be worse than having to make several, consecutive rate adjustments instead of getting it right the first time.

The consumer interest is entirely protected with respect to extending the deferral period for small operators. The only restructuring required of these operators is to make sure their rates for each component of service are appropriately distributed. Since small operators are allowed to maintain their March 31, 1994 rate levels (at least with respect to the new regulations), consumers will pay the same amount in the aggregate.

Although the under 1,000 subscriber systems are avoiding immediate rollbacks, SCBA also urges that the deferral extension be granted to those owned by small MSOs. This by itself will limit relief to those smaller companies that clearly have greater difficulty complying with the new regulations. Furthermore, SCBA suggests that many of the under

[12]A small MSO is defined as one with 250,000 or fewer subscribers that has an average system size of 1,000 or fewer subscribers and no system larger than 10,000 subscribers.

1,000 subscriber systems are owned by companies having 15,000 or fewer subscribers[13] and therefore gain no revenue advantage through the extension.

SUMMARY

SCBA requests that the Commission consider this Emergency Petition on an expedited basis and quickly grant the requested extension. SCBA pledges its continued support for the Cable Bureau's intensive efforts to resolve these fundamental issues. In addition, a short 49 day extension would not impact either rates or revenues for most of the cable systems and operators affected. Therefore, our position strikes a fair balance between protecting the rights of both operators and consumers.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

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[13]For example, more than half of SCBA's members have fewer than 1,000 subscribers in total.